



THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

PRICE DANIEL
ATTORNEY GENERAL

December 12, 1947

Hon. Sam Dollahite
County Attorney
Falls County
Marlin, Texas

Opinion No. V-453

Re: Compensation of County
Treasurer of Falls County

Dear Sir:

You have requested an opinion from this office relative to the liability of Falls County on a claim filed with the Commissioners' Court for alleged unpaid balance on back salary due the county treasurer from January 1, 1936, to May 1, 1947. Your request is as follows:

"The county treasurer of Falls County, Mr. J. D. Mires, has filed a claim with the commissioners' court of Falls County alleging that the salary of his office is set by law at \$2000 per year and requesting the unpaid portion of his back salary.

"I have rendered the court my opinion on the validity of his claim and he has filed a memorandum of authorities with the court as the basis of his contentions. My opinion and his memorandum are enclosed. The court has requested me to ask you for an opinion in this matter.

"Mr. Mires' claim and the orders on which it is based are set out in the enclosed opinion and memorandum."

Article XVI, Section 44, Constitution of Texas, provides for the election of the county treasurer and that such officer shall have such compensation as may be provided by law. Article XVI, Section 61, adopted August 24, 1935, provides that all district officers in the State of Texas and all county officers in counties having a population of 20,000 or more according to the last preceding Federal Census shall be compensated on a salary basis. Article 3941, V. C. S., provides that the county treasurer shall receive commissions on monies re-

ceived and paid out by him. Article 3943 provides that the commissions allowed to any county treasurer shall not exceed \$2,000 annually. Section 13 of Article 3912e provides that the Commissioners' Court in counties having a population of 20,000 inhabitants or more and less than 190,000 inhabitants shall fix the salary of the treasurer at a sum of "not less than the total sum earned as compensation by him in his official capacity for the fiscal year 1935."

Falls County had a population according to the 1930 Federal Census of 38,771 inhabitants and according to the 1940 Federal Census, a population of 35,984 inhabitants. Therefore, prior to the adoption of Article XVI, Section 61, and the enactment of the Officers' Salary Law in 1935 (S. B. No. 5, Ch. 465, Acts of the 44th Leg., 2nd Called Session, p. 1762), the compensation of the county treasurer was governed by the provisions of Articles 3941 and 3943. Since January 1, 1936, the county treasurer of Falls County has been entitled to a salary at a sum "of not less than the total sum earned as compensation by him in his official capacity for the fiscal year 1935."

In determining the total sum earned by the treasurer for the fiscal year 1935, the primary question to be determined is the validity of the Commissioners' Court's orders of February 13, 1933, and June 11, 1935. These orders set out in your memorandum are as follows:

"1. Motion made duly seconded and carried that the County Jailor be allowed a salary of Seventy Five (\$75.00) & No/100 Dollars per month, also that the salary of the County Treasurer be set at Sixty Five (\$65.00) and No/100 Dollars per month. Passed at meeting held February 13, 1933, recorded in Vol. 6, page 100, Commissioners Court Minutes of Falls County, Texas.

"2. Motion made by G. H. Asbury, seconded by M. M. Allen, that the salary of the County Treasurer be raised Ten (\$10.00) Dollars per month. Passed at meeting held June 11, 1935, recorded in Vol. 6, page 325, Commissioners Court Minutes of said

County."

The case of Greer v. Hunt County (Com. App.) 249 S. W. 831, held that the order of the Commissioners' Court placing the county treasurer on a salary basis was void. In determining that the order before the court actually placed the county treasurer on a salary basis instead of an effort to limit the maximum amount of commissions the treasurer could earn, the following principle of law was announced:

"There is no question but that the order in the present case was void under this holding. There was no effort to limit the maximum amount of commissions which the treasurer could earn; but in lieu thereof a definite fixed salary of \$1,200 per annum was substituted. This salary was payable, under the order, whether or not the commissions amounted to as much as the salary. We agree with counsel for defendant in error that merely calling the compensation a salary or calling it commissions is not necessarily controlling. If the commissioners' court had ordered that the treasurer should receive 'a salary' of \$1,200 per annum with the proviso that, if his lawful commissions should amount to less than the salary, he should not receive in excess of his lawful commissions, this in fact would have been fixing a maximum which the treasurer could earn as commissions. On the other hand, had the commissioners' court ordered that the treasurer should receive the definite sum of \$1,200 per annum 'as commissions', regardless of the amount of money passing through his hands upon which he would by statute be entitled to commissions, we think the effect of this order would be to fix a salary basis of compensation, and the order would be void, regardless of the fact that it denominated the compensation as commissions. The controlling element in determining whether the amount to be received is upon a commission or salary basis is whether that amount, by whatever name it may be called, is absolute and fixed regardless of what the lawful commissions may be, or is made contingent up-

on earning that amount as commissions."
(Emphasis ours)

In the case of Montgomery County v. Talley, 169 S. W. 1141, the court had before it the following order:

"It is hereby ordered by the court that the salary of the county treasurer, from and after December 10, 1910, shall be, and it is hereby fixed, at the sum of \$600.00 per annum, and this action of the court was unanimous."

Montgomery County in this case contended that the treasurer's compensation was limited to the amount of \$600.00 in accordance with the above quoted order. The county treasurer contended that the Commissioners' Court's order was void because it attempted to fix the salary of the county treasurer in violation of Article 3873, R. C. S., of 1911 (now 3941) and he was therefore entitled to retain the maximum amount of commissions allowed by law. The court sustained the county treasurer in these contentions. We quote the following:

". . . The order of March 30, 1910, before set out, does not fix the commissions of the county treasurer of Montgomery county, but provides that he shall receive a salary of \$600 per year. We think it clear that a statute which directs the commissioners' court to fix the compensation of an officer by allowing him commissions on moneys handled by him does not authorize such court to pay the officers a fixed yearly salary, but on the contrary, by necessary implication, prohibits his being paid in this way.

"The order of March 30, 1910, being void, the only law, prior to the order of the commissioners' court of June 8, 1911, before set out, fixing appellee's compensation, was article 3873 of the statute above quoted, and article 3875, which provides that 'the commissions allowed to any county treasurer shall not exceed \$2,000.00 annually.'

"The commissioners' court having failed to fix appellee's commissions, he was entitled to receive the compensation provided by the statute until such compensation was changed by an order of the commissioners' court fixing his commissions. Bastrop County v. Hearn, 70 Tex. 563, 8 S. W. 302; Hill County v. Sauls, 134 S. W. 267; City of San Antonio v. Tobin, 101 S. W. 269."

For similar holdings see Stephens v. Mills County, 113 S. W. (2d) 944; Williams v. Cass County, 147 S. W. (2d) 588; Rusk County v. Hightower, 202 S. W. 802; Kaufman County v. Gaston, 250 S. W. 741; Bastrop County v. Hearn, 70 Tex. 563, 8 S. W. 302.

The orders of the Commissioners' Court of Falls County quoted above made the compensation to be received by the county treasurer an absolute and fixed amount regardless of what the maximum commissions would have been. Therefore, under the ruling of the above cited cases, the orders were void as attempting to change the basis or plan for compensating the county treasurer. Since the orders were void, and in view of the holdings in Montgomery County v. Talley and Greer v. Hunt County, the county treasurer was entitled to receive in 1935 the compensation provided in Article 3941, V. C. S. not to exceed the maximum of \$2000.00 set by Article 3943 V. C. S. Since January 1st, 1936, the minimum salary set by Article 3912e, section 13, V. C. S., has been the amount officially earned in 1935. It was held in the case of Nacogdoches County v. Jinkins, 140 S. W. (2d) 901, writ refused, that the Commissioners' Court was without authority to fix the salaries of those officers covered by section 13 of Article 3912e at a sum less than the prescribed minimum (the official earnings in 1935) and that an order fixing a salary below the minimum was without authority and void. We quote the following:

"Article 3912e, section 13, fixed the salary of District Clerks in the class in which Nacogdoches County fell, at not less than the total sum earned as compensation by him in his official capacity for the fiscal year 1935 and not more than the maximum amount allowed such officer under laws existing on August 24, 1935. The legislature having prescribed the minimum (the official earn-

ings in 1935) and that being shown to have been \$3,241.93, the Commissioners' Court did not have the authority to ignore this statutory provision of minimum salary and fix the salary at \$2,750. The terms of the statute authorizing the Commissioners' Court to fix the salary at any sum not less than a certain minimum and not more than a certain maximum, were mandatory and could not be ignored by the members of the court at their discretion. The order fixing appellee's salary at \$2,750 was without authority and void."

Therefore, it is our opinion that the county treasurer has been entitled to a minimum annual salary since January 1st, 1936 equal to the amount of commissions he was authorized to retain in 1935 under Articles 3941 and 3943 (his official earnings in 1935). In other words, if he received and paid out in 1935 such amounts of money that the commissions he would have been entitled to therefor under Article 3941 would amount to \$2000.00, then his minimum salary has been, since January 1st, 1936, \$2000 per year. On the other hand, if the county treasurer did not handle sufficient money in 1935 to entitle him to commissions totaling \$2000, his minimum salary since January 1st, 1936 would not be \$2000 but the sum equal to the amount of commissions he was entitled to in 1935 under Articles 3941 and 3943. The amount of commissions the county treasurer was entitled to in 1935, is, therefore, dependent upon the amount of monies received and paid out by him in that year, a factual question upon which this office cannot pass.

This opinion is not to be construed as passing upon the question of whether a plea of limitation could or should be pleaded or claimed by the Commissioners' Court if a suit were brought to collect the unpaid portion of back salary due the county treasurer.

SUMMARY

The orders of the Commissioners' Court of Falls County passed prior to the Officers' Salary Law (Art. 3912e, Sec. 13, V. C. S) attempting to change the basis of compensation for the county treasurer are void and the county treasurer was entitled to receive

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commissions in 1935 as provided for by Articles 3941 and 3943 V. C. S. Subsequent to 1935 the county treasurer of Falls County has been entitled to a minimum salary equal to the amount of his official earnings in 1935. Arts. 3941, 3943, 3912e, Sec. 13, V. C. S.; Montgomery County v. Talley, 169 S. W. 1141; Greer v. Hunt County, 249 S. W. 831.

Very truly yours

ATTORNEY GENERAL OF TEXAS

By 
John Reeves
Assistant

JR:djm:mw

APPROVED:


PRICE DANIEL
ATTORNEY GENERAL